

SUPREME COURT OF THE UNITED STATES

IN THE SUPREME COURT OF THE UNITED STATES

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TIM SHOOP, WARDEN,)
Petitioner,)
v.) No. 21-511
RAYMOND A. TWYFORD, III,)
Respondent.)
- - - - -

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1 P R O C E E D I N G S

2 (11:50 a.m.)

3 CHIEF JUSTICE ROBERTS: We'll hear
4 argument next in Case 21-511, Shoop versus
5 Twyford.

6 General Flowers.

7 ORAL ARGUMENT OF BENJAMIN M. FLOWERS

8 ON BEHALF OF THE PETITIONER

9 MR. FLOWERS: Thank you, Mr. Chief
10 Justice, and may it please the Court:

11 Justice Jackson long ago warned
12 against giving the convict population of the
13 country new and unprecedented opportunities to
14 litigate until they serve their sentences or
15 make the best of increased opportunities to
16 escape.

17 The Sixth Circuit here blessed
18 precisely the sort of opportunity he warned of.
19 It held that when a federal statute prohibits
20 ordering a prisoner's transportation with a writ
21 of habeas corpus, courts may instead order
22 transportation under the All Writs Act.

23 But courts have no such power. Every
24 All Writs order must be agreeable to the usages
25 and principles of law, meaning the traditional

1 writs as altered by statute. Transportation
2 orders must be agreeable to habeas law because
3 habeas writs were the only traditional writs
4 used for ordering the transportation of
5 prisoners. So, when a federal habeas statute
6 prohibits ordering transportation with a writ of
7 habeas corpus in a particular situation, courts
8 may not evade that prohibition by issuing a
9 transportation order under the All Writs Act.

10 But the order here was improper for a
11 second reason regardless. Every All Writs Act
12 order must be necessary or appropriate in aid of
13 the issuing court's jurisdiction. The order
14 here doesn't qualify because it evades the rules
15 governing discovery in habeas cases and
16 facilitates the development of evidence that no
17 habeas court can even consider.

18 All that leaves only the question
19 whether the circuit had jurisdiction in this
20 case, and it did. The warden satisfied all
21 three elements of the collateral order doctrine.
22 First, the order here is conclusive. Second,
23 the question whether the All Writs Act empowers
24 a federal court to interfere with the
25 sovereign's management of its own prisons is

1 both important and separate from the merits.
2 And, finally, the state cannot -- states cannot
3 meaningfully protect themselves from
4 transportation orders unless they're allowed to
5 appeal immediately.

6 Regardless, the warden moved in the
7 alternative for mandamus relief. If the Court
8 thinks the collateral order doctrine doesn't
9 apply, it should remand with instructions to
10 issue a writ of mandamus correcting the district
11 court's egregiously wrong and dangerous
12 decision.

13 I welcome your questions.

14 JUSTICE THOMAS: Just one question,
15 General. Why should we consider this
16 transportation order a writ of habeas corpus?

17 MR. FLOWERS: Well, I -- I think there
18 are actually two answers to that. One is you
19 may not because, under the All Writs Act, they
20 need to find a -- some traditional writ to which
21 this is analogous. We candidly don't think
22 there is one, but the best they can possibly do
23 in finding an analogue is a habeas writ.

24 JUSTICE THOMAS: So what do you think
25 it is?

1 MR. FLOWERS: We don't -- we think
2 it's not analogous to any historical writ. It's
3 an ad hoc writ that the court had no authority
4 --

5 JUSTICE THOMAS: No, I mean, how would
6 you -- I'm sorry, how would you characterize it
7 for the purpose of deciding this case?

8 MR. FLOWERS: We would say that
9 because the closest analogue, albeit a bad one,
10 is habeas law, the order here was a writ in the
11 nature of habeas corpus and therefore had to be
12 consistent with statutes like 2241(c).

13 And it was not consistent with that
14 because, as Judge Easterbrook explained in his
15 opinion for the Court in Ivey in the Seventh
16 Circuit, 2241(c) prohibits writs of habeas
17 corpus except in very -- I'm sorry.

18 JUSTICE THOMAS: No.

19 MR. FLOWERS: Except in specified
20 situations, and (c)(5) is the only one dealing
21 with transportation. It deals with writs of
22 habeas corpus ad testificandum and ad
23 prosequendum. This is neither of those and
24 therefore falls outside (c)(5) and is
25 impermissible.

1 JUSTICE THOMAS: Thank you.

2 MR. FLOWERS: We --

3 JUSTICE SOTOMAYOR: Counsel, I don't
4 want to leave the collateral -- whether this is
5 a appealable collateral order. It is conclusive
6 under Mohawk, but we'd said there that the
7 collateral appeal -- appealable orders are a
8 narrow and selective class. They have to be
9 final. They can't be reviewed on appeal.

10 But, if the district court ultimately
11 grants Respondent's habeas petition, you can
12 challenge the medical transport order and any
13 evidence that it produces on appeal. If you
14 succeed, that evidence could -- will be excluded
15 from consideration.

16 That is exactly what we held in
17 Mohawk, in a situation where the privilege could
18 be violated by to your turning over materials
19 even under seal, because the privilege is not to
20 turn them over to anybody, whether under seal or
21 not.

22 The third -- and I think this is your
23 important point -- is that somehow you have some
24 greater interest that this is an important
25 question separate from the merits because state

1 sovereignty is at issue. You're expending money
2 in transporting this prisoner.

3 But I understand that you're
4 transporting him to a hospital that's regularly
5 used by the prison to treat prisoners. You
6 could put him on a bus that's going to that
7 prison with other prisoners, so there's no extra
8 money in the transport. The inmate's test is
9 going to be paid by defense counsel, not by the
10 state.

11 But, more importantly, there are all
12 sorts of discovery orders that require
13 expenditure by the state, including deposing
14 your experts -- you have to pay for those
15 experts to be deposed -- including sometimes
16 doing searches of your own records and
17 organizing them. That accounts for vast
18 expenditures. How -- and we don't let any of
19 those orders be reviewable.

20 So I don't know how this fits into the
21 Mohawk exception.

22 MR. FLOWERS: Let me try to take that
23 in three steps.

24 The first thing I want to emphasize --
25 I'll start sort of in reverse order. With the

1 separate from the merits prong, if this Court
2 determines that the inquiry is not separate from
3 the merits, then it has announced a standard,
4 and at that point, it can -- it can also
5 issue -- reach the issue under a mandamus
6 framework. But I'll put that aside for the
7 moment.

8 JUSTICE SOTOMAYOR: That is an
9 interesting question because it is tied up with
10 the merits. If -- if the court has power, the
11 question is what limits, if any, are in that
12 power, correct?

13 MR. FLOWERS: So it's not --

14 JUSTICE SOTOMAYOR: So that's a merits
15 question.

16 MR. FLOWERS: No, because, if we're
17 correct, under the All Writs Act, courts have no
18 authority to issue transportation orders under
19 --

20 JUSTICE SOTOMAYOR: But it does -- but
21 the merits still have to be addressed one way or
22 another?

23 MR. FLOWERS: No, we don't think so --

24 JUSTICE SOTOMAYOR: So it's not
25 separate from the merits.

1 MR. FLOWERS: Respectfully, Your
2 Honor, no, you'll never reach the merits of the
3 underlying claims because the only question
4 would be whether the court had the power under
5 the All Writs Act to do this, and the answer
6 will always be no. It's -- I do want to
7 emphasize every single circuit to have ever
8 considered this has -- has said the collateral
9 order doctrine applies.

10 With respect to the injury, we're not
11 worried about --

12 JUSTICE SOTOMAYOR: In Mohawk, many
13 have said privilege was, so we can't go by what
14 their practice is; we have to go by what Mohawk
15 said, correct?

16 MR. FLOWERS: I understand, though
17 Osborn, which was the last case in 2007 to
18 recognize when the collateral order doctrine
19 applies -- a case in which it applies, did say
20 that the fact that the circuits were unanimous
21 was significant.

22 I do want to, more importantly,
23 though, get to your point about monetary harms.
24 Our -- the harms we're concerned with have
25 nothing to do with money. We're worried about

1 public safety and interference with the
2 sovereign management of the prisons.

3 In that context, the Court has said,
4 for example, in United States v. Nixon, that
5 even in a -- in a situation where the
6 President's subpoenaed to turn over documents,
7 which is basically discovery, the -- it could be
8 immediately appealed because of the interference
9 with the operations of another branch.

10 Separate sovereigns are entitled to --

11 JUSTICE SOTOMAYOR: But discovery
12 orders of all kind pose that risk.

13 MR. FLOWERS: And so that brings me to
14 the second point I wanted to reach, which is how
15 we distinguish Mohawk, and I'm -- I'm happy for
16 the opportunity to do so.

17 What -- what the Court stressed in
18 Mohawk is that most attorney-client rulings are
19 mundane questions, there's usually no error, and
20 they can be corrected later on appeal because
21 usually the harm in the disclosure of
22 attorney-client privilege, the Court said, is
23 confined to the case at bar. It leads to
24 evidence that shouldn't have been admitted. It
25 causes the other side to have insight into

1 litigation strategy and so forth.

2 The exact opposite is true of
3 transportation orders. Every single time we're
4 subject to this order, we suffer harm that is
5 unrelated to the case, namely, the harm from
6 having to expose the public to this danger. So
7 that distinguishes that.

8 I believe you also alluded to the
9 importance of the issue, and sovereignty is what
10 makes that different. Again, I'd point you to
11 United States v. Nixon, for example, which said
12 that we're not --

13 JUSTICE SOTOMAYOR: You -- you still
14 haven't addressed my question. How are all of
15 those issues different in any normal discovery
16 situation?

17 MR. FLOWERS: Because, in a normal
18 discovery situation, the harm the party suffers
19 can be cured on appeal.

20 So, for example, if -- if
21 attorney-client privilege is breached and
22 information is given to one side that they can
23 then use as evidence against them at trial, that
24 can result in reversal. Most discovery orders
25 are even easier than that.

1 What makes this different is the harm
2 we're sustaining has nothing to do with this
3 case. The harm we're -- we're worried about is
4 not the harm we sustained from this evidence --

5 JUSTICE SOTOMAYOR: So could they do
6 a -- a writ if the defense paid for the
7 transportation and the security?

8 MR. FLOWERS: No, because, again, the
9 writ has nothing to do with payment. The --
10 the -- or the injury has nothing to do with
11 payment. The injury we're suffering is the
12 sovereign interference with our -- our safe
13 operation of our prisons that we cannot remedy
14 on appeal, plus -- plus the threat to public
15 safety. Once we transport him, we have
16 sustained all of those harms. There's no
17 unringing that bell after the fact.

18 That's what makes this case different
19 than discovery -- typical discovery orders.
20 It's what makes it more like the Nixon case or
21 if you want to look at the various immunity
22 cases where the harm of actually going to trial
23 is fully sustained once you reach trial.

24 If there are no questions on that, I
25 can briefly reach the -- the questions the Court

1 granted certiorari to address. We do think the
2 closest analogue here is habeas, and that's why,
3 because this is inconsistent with habeas law,
4 the writ can't issue. And if the Court agrees
5 with that, that's all you need to say to reverse
6 the Sixth Circuit.

7 Now there's been this late push to
8 analogize two discovery rules saying that this
9 is like certain rules that exist in the -- in
10 the Federal Rules of Civil or Criminal
11 Procedure.

12 There are two problems with that. The
13 first is that the discovery rules that they draw
14 analogies to are not actually traditional writs.
15 And you need to find some traditional writ to
16 which this is analogous.

17 Botsford, this Court's decision in
18 Botsford makes absolutely crystal-clear that
19 courts have no sort of freestanding common law
20 authority to invent new discovery methods. So
21 there was no traditional writ that allowed that.

22 What's more is that even if the
23 discovery rules provided the relevant usages and
24 principles, the order here isn't agreeable to
25 those usages and principles. The reason for

1 that is that Habeas Rule 6(a) provides the
2 exclusive means for -- exclusive means for
3 obtaining discovery in habeas. And it requires
4 a good cause showing that Twyford has not met
5 and has never argued he can make and, indeed,
6 has affirmatively waived any intent to seek
7 relief under.

8 For that reason, this is permitting
9 review that the habeas rules affirmatively
10 disclose. That makes it like the Carlisle case,
11 it makes it like the Syngenta case, and it makes
12 it like the Pennsylvania Bureau of Corrections
13 case in which this Court said that when -- when
14 there's a statute that governs a particular
15 issue, parties may not evade that using the All
16 Writs Act.

17 JUSTICE SOTOMAYOR: Are you taking the
18 position that the SG was wrong in all the
19 examples it gave of transport orders, for
20 example, in a 1983 claim involving excessive
21 force where prisoners ordered into a different
22 medical facility -- to a medical facility for
23 examination or a danger posed in a prison that's
24 been proven, there's been a threat of a guard
25 going to hire someone to kill him and there's an

1 order to transport him to another prison?

2 All of those, you say, are wrong.

3 MR. FLOWERS: I don't think they're
4 wrong. I think those orders would not be issued
5 under the All Writs Act and, indeed, could not
6 be. So let me try to take them in the order you
7 mentioned them.

8 If the person has proved a violation,
9 say, of the Eighth Amendment, that we're not
10 providing medical care or may be exposing them
11 to a danger, then they can seek -- they can
12 bring an Ex Parte Young action, seek relief.

13 If the Court issues an injunction, the
14 Court has never suggested that the inherent
15 authority to enjoin a legal action stems from
16 the All Writs Act. So that's off the table.

17 The second would be that even if they
18 for some reason can't bring that suit, if we are
19 doing something that violates their
20 constitutional rights, they can bring a mandamus
21 suit to compel us to do something to vindicate
22 their rights.

23 And then, finally, I took you to also
24 to be asking and I take the SG to make the point
25 that in some cases, if a federal prisoner brings

1 a 1983 suit, they may wish to have discovery and
2 that discovery may entail a physical
3 examination.

4 So here's my answer to that. Rule
5 35(a) of the Federal Civil -- Federal Rules of
6 Civil Procedure at least arguably would permit
7 that plaintiff to seek that relief. The courts
8 have gone both ways on the question. I don't
9 think the Court needs to decide that here, but
10 it's at least possible that Federal Rule of
11 Civil Procedure 35 will allow that.

12 If it does not allow that, this Court
13 can, of course, amend Federal Rule 35 to permit
14 it. And that's -- if the answer is not provided
15 by Federal Rule 35, that's the way to address
16 the question.

17 The matter of when prisoners should be
18 moved from one place to another and the threat
19 to public safety that it poses makes this an
20 incredibly important policy question.

21 It's the sort of question that should
22 be answered in either a legislative process by
23 Congress or a quasi-legislative process like
24 this Court's Rules Enabling Act process that
25 would allow all the relevant stakeholders to

1 bring forth all the relevant concerns.

2 I don't think this Court wants to
3 bless a situation in which district courts are
4 resolving that on an ad hoc basis, oftentimes,
5 frankly, giving short shrift to the safety
6 interests that the states -- that states -- that
7 states have.

8 CHIEF JUSTICE ROBERTS: So are you
9 saying putting aside your Rule 35 point that the
10 only reason you can transport a prisoner is to
11 testify or for trial?

12 MR. FLOWERS: Well, I -- I wouldn't go
13 quite that far. What I would say is that
14 insofar as -- that's the only thing you can do
15 under the All Writs Act. There may be a
16 particular statute that applies in a specific
17 situation that allows transportation. There may
18 be a federal rule that allows transportation.

19 But, if there is none and if you
20 resort to the All Writs Act, then you need to
21 consider that the transportation is agreeable to
22 the usages and principles of law. And if it's
23 inconsistent with 2241(c), it is not, and,
24 therefore --

25 CHIEF JUSTICE ROBERTS: Well, but, I

1 mean, we have a lot of cases that talk about the
2 broad and flexible office of the great writ
3 and -- under the All Writs Act, and it seems
4 like that's a very confining construction.

5 MR. FLOWERS: I think what we say is
6 consistent with all those precedents, so I'll --
7 I'll try to take them in order.

8 One is Price, where the Court ordered
9 a petitioner to be transported to argue his --
10 his appeal pro se. And that was before 2241(c)
11 was enacted. There was a predecessor statute
12 that was strikingly similar. The key point,
13 though, is that Price never considered that
14 statute. I don't know if it wasn't raised or
15 what the reason was, but it simply never
16 addressed the problem.

17 So stare decisis absolutely requires
18 that you respect the holding of Price. It does
19 not require extending Price's holding to a new
20 context when doing so would require rejecting an
21 argument that case never considered.

22 The next case I think is Hayman.
23 Hayman comes out exactly the same way under our
24 theory, though the reasoning would be slightly
25 different in light of subsequent legal

1 developments.

2 So, in Hayman, it was a 2255 case;
3 2255 does anticipate transportation orders. And
4 the Court said that as long as you have the All
5 Writs Act you can issue a writ in the nature of
6 habeas corpus. That, by the way, shows --
7 proves our point that these writs are in the
8 nature of habeas corpus.

9 But it -- it issued what was
10 effectively a writ of habeas corpus ad
11 testificandum. You might ask why didn't it just
12 do it under (c)(5). That's the way the case
13 would come out today. The Court wouldn't need
14 the All Writs Act.

15 The reason it didn't invoke (c)(5) is
16 because, at the time, courts had assumed and
17 Hayman, in fact, assumed that a different
18 statute, 2241(a), prohibited courts from
19 invoking 2241(c) except with respect to
20 prisoners located within their jurisdiction.

21 Years later, in Carbo, this Court
22 clarified that that was not the case and that
23 2241(a) has no bearing on writs issued under
24 (c)(5). So Hayman comes out the same way and
25 Price came out differently under an old statute

1 that it failed to consider. So I don't think
2 this is contrary to any of those.

3 And I do want to stress that allowing
4 it under the All Writs Act would be inconsistent
5 with the cases this Court's announced in the
6 years since New York Telephone that have
7 attempted to rein in, shall we say, overly
8 expansive readings of the Act. So, in Syngenta,
9 in Carlisle, and to some extent Pennsylvania
10 Bureau of Corrections, the Court has made
11 absolutely crystal-clear that when there's a
12 statute or a rule that governs a situation, you
13 cannot use the All Writs Act to evade that.

14 This, if it's anything, is a writ of
15 habeas corpus. They need to be agreeable to
16 that. It's not, and for that reason, it's
17 improper.

18 If there are no further questions, I'm
19 happy to reserve the rest of my time.

20 CHIEF JUSTICE ROBERTS: Thank you,
21 counsel.

22 Ms. Reaves.

23 ORAL ARGUMENT OF NICOLE F. REAVES

24 FOR THE UNITED STATES, AS AMICUS CURIAE,

25 SUPPORTING NEITHER PARTY

1 MS. REAVES: Mr. Chief Justice, and
2 may it please the Court:

3 In certain rare circumstances, a
4 federal court may order a state prisoner
5 transported under the All Writs Act. Such an
6 order can be agreeable to the usages and
7 principles of law because it is analogous to
8 numerous discovery provisions and consistent
9 with the Court's long-standing use of the Act to
10 assist litigants in conducting factual
11 inquiries.

12 And a transport order may be necessary
13 or appropriate in a Section 2254 case if a
14 prisoner shows good cause for the order and
15 demonstrates that equitable considerations
16 support his transport request. The Court took
17 this sort of authority for granted in Rees, and
18 it should not now foreclose courts from issuing
19 transport orders under the All Writs Act.

20 This Court has repeatedly rejected the
21 warden's proposition that an order may be issued
22 under the Act only if there's a common law
23 analogue. And the warden's sweeping assertion
24 that Section 2241(c) governs all prisoner
25 transport relies on an atextual reading of that

1 provision and a misunderstanding of habeas
2 corpus.

3 I'd welcome the Court's questions.

4 JUSTICE THOMAS: If we don't have a
5 common law analogue, how do we determine whether
6 or not the writ is agreeable to the usages and
7 principles of law?

8 MS. REAVES: So a couple of points on
9 that, Justice Thomas.

10 First of all, I think I'd urge the
11 Court in this particular case to take the sort
12 of approach that it took in Harris, where, when
13 in a similar situation, when determining whether
14 a 2254 -- 2255, excuse me, petitioner could
15 engage in discovery, and there weren't any
16 applicable discovery provisions to 2255 at that
17 point in time, the Court looked to the Federal
18 Rules of Civil Procedure.

19 And I think that that is consistent
20 with this Court's general approach in this sort
21 of situation. It's -- the Court's been fairly
22 limited when it finds something blocked by
23 existing statutory law and has only done so in a
24 couple of situations that I'd be happy to
25 elaborate on.

1 JUSTICE THOMAS: Actually, what I'd
2 like you to elaborate on just a bit, your -- the
3 jurisdictional question.

4 MS. REAVES: So the United States does
5 agree that the warden has jurisdiction here. I
6 think that the order, the transport order,
7 conclusively determines the disputed question of
8 whether there will be transport. It resolves an
9 issue completely separate from the merits.

10 It's separate because it's almost an
11 evidentiary consideration under the good cause
12 standard as to whether this particular order
13 should issue. And it's important because the
14 state does have interests like the President had
15 in Nixon in running its prisons, imposing
16 lawful -- presumptively lawful sentences without
17 undue federal influence -- interference, and
18 avoiding the risks inherent in prisoner
19 transport.

20 JUSTICE THOMAS: So how would you
21 distinguish this, though, from any other
22 discovery order?

23 MS. REAVES: So the harm in a
24 discovery order -- with a discovery order can be
25 remedied on -- at the final judgment because

1 whether the evidence did or didn't come in can
2 be fixed by a new trial.

3 Here, the harm that the warden is
4 complaining about is just inherent in transport.
5 It's nothing related to this evidence coming in
6 or staying out. And that particular harm can't
7 be remedied on appeal from a final judgment
8 here.

9 JUSTICE SOTOMAYOR: Counsel, but
10 that's true of a Federal Rule 35 order. If
11 someone's mental health is at issue and the
12 court orders under Rule -- Federal Rule 35 a
13 transport, that medical evidence can or cannot
14 come in, but it may or may not be dispositive of
15 the outcome of the case?

16 MS. REAVES: So a couple of responses
17 to that.

18 First of all, when it comes to the
19 collateral order doctrine, it's true that lower
20 courts have generally held that Rule 35 orders
21 are not immediately appealable, but that's
22 because a Rule 35 order is focused on requiring
23 an individual to be subjected to an examination
24 and the resulting evidence. There isn't usually
25 a transport component.

1 JUSTICE SOTOMAYOR: No, that's a
2 transport order to it. That Rule 35 is a
3 transport order, permission to transport someone
4 for a medical exam.

5 MS. REAVES: I don't think courts have
6 ever interpreted it. We were unable to find an
7 example of a lower court using Rule 35 in a
8 situation like this, where a prisoner seeks
9 transport for an examination.

10 JUSTICE BREYER: So what do you --
11 suppose the order, same question, same order,
12 but it was denied. Can the prisoner appeal it?
13 I mean, they -- can the -- you know, the person
14 who wanted the order, can he appeal?

15 MS. REAVES: So I don't think you need
16 to reach that question in this case.

17 JUSTICE BREYER: Well, I just want to
18 know what your response is.

19 MS. REAVES: But, yes, lower courts
20 have unanimously found -- just as they've
21 unanimously found that orders like this are
22 immediately appealable, they've found that
23 orders denying transport are not immediately
24 appealable. And --

25 JUSTICE BREYER: They're not? Okay.

1 So -- and we have now a new category of orders,
2 which category of discoveries -- orders -- by
3 the way, discovery costs money. And so even if
4 a defendant is -- doesn't end up making much
5 difference to the case, it's going to cost him
6 money. So he'd like it now to save that money,
7 just as the state would like it now to save the
8 evils that they say this order is going to
9 provide.

10 So I'm still back to the original
11 question that Justice Thomas asked. There is a
12 category of orders such that if you grant them
13 the defendant can appeal. Often the state.
14 But, if you deny them, there is no appeal.

15 Now are there other things like that?
16 Is that a big category, a little category? And,
17 by the way, there are other methods of
18 appealing. You have 1292(b), not perfect, but
19 it's there. And you also have mandamus.

20 So I'd like to know rather
21 specifically what this category is that you're
22 giving appellate rights to, collateral appellate
23 rights, where one side can do it but not the
24 other.

25 MS. REAVES: So, Justice Breyer, let

1 me offer a couple responses to that.

2 First of all, I think the category
3 here would be orders requiring a state warden to
4 transport a prisoner. That would be immediately
5 appealable.

6 JUSTICE BREYER: But not -- not a
7 state -- not -- not a state order, not a
8 discovery order which requests that the
9 Secretary -- the state's Secretary of the
10 Treasury go through records and provide the
11 records that the person -- you know, we can
12 think of dozens of things like that. So I don't
13 know if you can limit it just to transport
14 orders?

15 MS. REAVES: So I think -- I think a
16 court can limit it pretty easily to transport
17 orders, and lower courts have had no problem
18 doing that, and that's because the state and the
19 warden have to incur a norm -- normal discovery
20 costs and burdens. That's not something that
21 creates the basis for an immediate appeal, but
22 the point --

23 JUSTICE BREYER: Okay. By the way, I
24 just did think of one. I mean, what -- what we
25 would like is we would like a -- a -- a person

1 of the defendant's choosing, if you wish,
2 happens to be the state, to go through the --
3 what do you call it, you know, where they put
4 the dead people -- we'd like them to look at
5 that.

6 MS. REAVES: At the morgue?

7 JUSTICE BREYER: Yeah, the morgue. We
8 want them to go through the morgue because there
9 happens to be stuff in there that will help us
10 win this. And the state says: You can't go
11 into the, morgue. My God, I mean, you know,
12 that's sovereignty and a lot of things.

13 Okay? Are they included or not?

14 MS. REAVES: I don't think so. And,
15 again, that's because one of the interests --
16 the state has a number of interests here, but
17 one of them is the risks inherent in transport
18 itself.

19 Going back to the component of your
20 question about whether there are other
21 situations in which there are asymmetrical
22 appeal rights, the Barnes Seventh Circuit
23 decision that Petitioner cited in their opening
24 brief gives several examples of other
25 asymmetrical appeal rights under the collateral

1 order doctrine that includes grants of qualified
2 immunity, particularly partial grants of
3 qualified immunity. It includes bonds in civil
4 cases. The denial of a bond is immediately
5 appealable; the grant is not.

6 And in addition to that, there are
7 certain First Amendment pretrial orders that are
8 generally seen as immediately appealable if
9 they're granted but not if they're denied.
10 So --

11 JUSTICE SOTOMAYOR: Counsel, you had
12 answered my earlier question I asked about
13 Federal Rule of Civil Procedure 35, and you said
14 that's not immediately appealable.

15 But it says, and it's the court where
16 the action is pending may order a party whose
17 mental or physical condition, including blood
18 group, is in controversy to submit to a medical
19 exam. The court has the same authority to order
20 a party to produce for examination a person who
21 is in its custody or under its control.

22 So, if you start by telling me that
23 the All Writs Act, we should look at the federal
24 rules to guide us on what is permissible or
25 within the usages of law, doesn't that tell me?

1 MS. REAVES: I think that Rule 35 is a
2 good analogue, along with other rules --

3 JUSTICE SOTOMAYOR: So why, if it's --

4 MS. REAVES: -- of federal civil
5 procedure and federal criminal procedure.

6 JUSTICE SOTOMAYOR: -- if this is not
7 subject to collateral attack, why would this
8 order be?

9 MS. REAVES: Again --

10 JUSTICE SOTOMAYOR: It's in the
11 same -- the exact same issue.

12 MS. REAVES: So I disagree that it's
13 the exact same issue. I think orders requiring
14 a warden to transport a prisoner raise --

15 JUSTICE SOTOMAYOR: But the court has
16 the authority -- I'm reading it -- to order a
17 party to produce for examination a person who is
18 in its custody or under its legal control.

19 That's a transportation order in my
20 mind. And the rest of it, take my word for it,
21 just requires that the notice of the motion tell
22 you where, when, and by whom.

23 MS. REAVES: So, again, courts don't
24 generally view that as a transport order. It's
25 never been applied to require a warden to

1 transport a prisoner. To the extent it's
2 required, you know, an individual parent, for
3 example, to produce their child for physical
4 examination, that doesn't raise --

5 JUSTICE SOTOMAYOR: So you're --

6 MS. REAVES: -- the same sort of
7 state --

8 JUSTICE SOTOMAYOR: -- you're -- on
9 behalf of the United States, you're saying that
10 under Rule 35, any order issued under Rule 35 to
11 a warden would be collaterally reviewable?

12 MS. REAVES: If it ordered transport,
13 I think that it would, and that's consistent
14 with --

15 JUSTICE SOTOMAYOR: How about if it's
16 just an order of go here and be examined?

17 MS. REAVES: If it's an order, an
18 examination that could occur in the prison, I
19 don't think that would be a transport order. It
20 wouldn't be immediately appealable.

21 JUSTICE BREYER: Oh, well, by the way,
22 that order happens to ask the state to produce
23 John the Tiger Man, who is the most dangerous
24 prisoner they have ever discovered because here,
25 by the way, their complaint is, one, there is

1 danger, and, two, it costs money.

2 Well, they'll pay the money. So it
3 isn't going to cost them money. So they're left
4 with danger. And, by the way, depositions of
5 death row inmates may, in fact, cost a lot of
6 money. But you are saying that ordering a
7 deposition of a death row inmate is not
8 appealable or do you say it is appealable?

9 MS. REAVES: So I don't think the
10 Court would need to reach that. I think that if
11 the --

12 JUSTICE BREYER: The problem that I'm
13 having, you do need to reach it, because I'm
14 trying to figure out what the category is of --
15 of the orders that the state can appeal, the
16 discovery orders that the state can appeal
17 collaterally, but the prisoner cannot.

18 And you've got one of them,
19 transportation. And the reason you have
20 transportation, I take it, from the other side
21 is because it is danger involved. Okay. I have
22 only been here for a few minutes, and it seems
23 to me I've thought of a few, which also involve
24 danger.

25 Like the Tiger Man, okay, or death row

1 inmates. And I bet imaginative counsel there
2 can think of a few more. So do you want to
3 stick to the only orders that are appealable
4 immediately collaterally are transportation
5 orders and nothing else that provides danger or
6 what?

7 MS. REAVES: I think one way to think
8 about this would be is the category of orders,
9 as the Court suggested in Mohawk, always going
10 to raise this type of issue.

11 Here this type -- category of orders
12 because of the nature of transport are always
13 going to raise the risks issue.

14 Deposition orders, assuming --

15 JUSTICE KAGAN: I mean, aren't there
16 --

17 MS. REAVES: -- the deposition is
18 happening at the prison, that's not always going
19 to raise categorical issues the same way that
20 transport is. And I think for that reason, that
21 might be a situation in which mandamus or a
22 certified appeal is more appropriate and you
23 don't need the collateral order doctrine to come
24 in as to the entire category of orders.

25 JUSTICE KAGAN: Ms. Reaves, I'm just

1 curious, how many transports of prisoners are
2 there daily in the prison system?

3 MS. REAVES: I don't have a number for
4 that, but I think we --

5 JUSTICE KAGAN: Some of your amici say
6 thousands a day.

7 MS. REAVES: I -- I wouldn't contest
8 that but I would say that most of those are not
9 pursuant to a Court order. Most of those are
10 just occurring in the normal course of prison
11 administration and -- and aren't occurring in a
12 situation like this.

13 JUSTICE KAGAN: I take the point, but
14 it -- it does suggest that, you know, not every
15 transport of a prisoner is going to raise
16 security concerns of the kind that you're
17 talking about, but that's going to be, you know,
18 maybe the unusual case if prisons, they know how
19 to do this, they do it thousands of times a day?

20 MS. REAVES: So I don't think it's
21 just the security concerns here. It's also the
22 component of a -- that's definitely part of it,
23 but the additional components include the fact
24 that a federal court is interfering with a
25 state's prison administration in this kind of

1 enormous way.

2 And so I think all of those things
3 together makes this case look more like Nixon
4 from an interest perspective. And I'd also
5 point out about how --

6 JUSTICE KAGAN: So that's any court
7 order that a state can say you're interfering
8 with my sovereignty, that now becomes
9 immediately appealable?

10 MS. REAVES: No, it's all the
11 components that I just discussed. And I think
12 as far as your question goes about how often
13 this arises, the fact that this hasn't arisen
14 either direction since Mohawk until this
15 particular case shows how infrequently these
16 sorts of orders are litigated and why the Court
17 shouldn't be concerned about extending the
18 collateral order doctrine.

19 JUSTICE SOTOMAYOR: Well, once we say
20 that there's no power ever under any
21 circumstance, then all of the orders that we've
22 issued in the past in Rees, ordering the
23 transport of a prisoner to come argue before us,
24 ordering another habeas prisoner to be examined,
25 those were ultra vires by us, but we're stopping

1 other courts from doing the same thing, correct?

2 MS. REAVES: So I don't think that
3 whether something is immediately appealable
4 suggests any of those prior orders were invalid,
5 and -- and we aren't taking the position that --
6 obviously, the United States is taking the
7 position that orders like that can be
8 permissible under the All Writs Act.

9 CHIEF JUSTICE ROBERTS: Thank you,
10 counsel. Anything further?
11 Justice Kavanaugh?

12 JUSTICE KAVANAUGH: I just wanted to
13 follow up, Ms. Reaves, on Justice Thomas's first
14 question. So if there's no common law analog
15 and no specific statutory authorization, in the
16 end, it seems to be a policy judgment of sorts,
17 how much we think we should analogize to other
18 rules or what have you as you point out.

19 If it is in the end a policy judgment,
20 the other side says leave it to Congress or the
21 rules committees given the public safety issues
22 involved and just wanted you to respond to that.

23 And maybe also tell me what should
24 inform that policy judgment if we're making it.
25 Is it just the benefits, fairness, and

1 individual cases outweigh the costs, even though
2 you don't think that they do in this particular
3 case?

4 MS. REAVES: So I think it's important
5 to start from the fact that the All Writs Act is
6 always fulfilling a gap-filling role and it
7 always comes into play when a statute doesn't
8 directly cover a situation, but there is some
9 type of analog.

10 And obviously here we think that the
11 appropriate analogs to look at are these federal
12 rules we've identified. They don't directly
13 cover but they do come in through Rule 6 in
14 appropriate situations and that's what the Court
15 should be looking at.

16 As far as what the Court -- whether
17 the Court should feel uncomfortable here in this
18 particular case because of policy
19 considerations, I think that that isn't quite
20 the role for the Court to play here. I think
21 the Court has to ask, is there a gap that we can
22 fill and whether the -- the -- the components of
23 the All Writs Act are, in fact, met here.

24 And I think that the Court should look
25 at analogous cases again like Harris. You know,

1 the Court there, discovery rules at that point
2 in time didn't apply to 2255 cases but the Court
3 said that it could still engage in gap-filling
4 in that particular situation.

5 And if you're worried about the
6 transport component here and the dangers, you
7 know, as we explain in our brief, we do think
8 that part of the necessary or appropriate
9 consideration courts should take into account
10 are dangers related to that.

11 And if the Court wants to say
12 something along those lines here, that courts
13 need to take that into account before issuing
14 one of these transport orders under the All
15 Writs Act, that they can do that. And -- and
16 this Court could do that to make that clear.

17 JUSTICE KAVANAUGH: Thank you.

18 CHIEF JUSTICE ROBERTS: Anybody have
19 anything on this side? No?

20 Thank you, counsel.

21 Mr. O'Neil.

22 ORAL ARGUMENT OF DAVID A. O'NEIL

23 ON BEHALF OF THE RESPONDENT

24 MR. O'NEIL: Mr. Chief Justice and may
25 it please the Court:

1 The order that the state has spent the
2 last three years litigating simply requires the
3 warden to move an inmate between two secure
4 prison buildings, from the detention center to
5 the official prison hospital, so that the inmate
6 can undergo a medical test.

7 That kind of movement happens
8 thousands of times a day around the country
9 every day of the week. There is no appellate
10 jurisdiction over an interlocutory order
11 involving such a routine event, particularly one
12 that merely removes an obstacle to counsel's
13 investigation of the case.

14 To allow the appeal to proceed now
15 would require a dramatic expansion of the Cohen
16 doctrine despite this Court's consistent efforts
17 to narrow it. If this Court does create a new
18 Cohen category, it should affirm. There is no
19 basis for Petitioner's novel rule that the All
20 Writs Act can never be used as an authority for
21 a prisoner transportation order.

22 For three-quarters of a century, this
23 Court has approved of the use of the All Writs
24 Act in habeas cases and specifically for the
25 purpose of ordering prisoners transported. To

1 adopt Petitioner's categorical argument, this
2 Court would have to repudiate at least three of
3 its own decisions, cast serious doubt on federal
4 court authority on a wide range of other
5 contexts, and change the basic approach that has
6 characterized the All Writs Act for the last 200
7 years.

8 Once this Court concludes that the All
9 Writs Act permits prisoner transports in some
10 circumstances, the only question left is whether
11 the Act permits a transport in these
12 circumstances. That is a classic issue for the
13 district courts' discretion and the Sixth
14 Circuit correctly held that there was no abuse
15 of discretion here.

16 But if the Court adopts the standard
17 fundamentally different from the one the Court's
18 applied below, the only appropriate resolution
19 would be to remand so that the district court,
20 which has the competence and the familiarity to
21 untangle fact-bound questions could address it
22 in the first instance.

23 I welcome the Court's questions.

24 JUSTICE THOMAS: Do you know whether
25 you're going to use whatever it is you find from

1 the scan in a habeas proceeding?

2 MR. O'NEIL: Justice Thomas, I'm happy
3 to explain how this evidence would be useful to
4 us, but if you'll indulge me, I'd like to come
5 back after that to explain why that's not the
6 question either that this Court needs to answer
7 at this stage or that we -- we were required to
8 answer below but I will -- I will address the
9 question.

10 So there are at least four ways this
11 evidence would be useful. First, we have an
12 ineffective assistance at mitigation claim. The
13 jury never heard any evidence about the effect
14 of a point-blank gunshot wound on Mr. Twyford's
15 cognition and therefore his culpability. They
16 didn't hear anything about that because counsel
17 never bothered to investigate it.

18 That was so even though one of the
19 statutory mitigating factors under Ohio law was
20 mental defect. And even though the jury
21 instructions for the capital offense required
22 the jury to find pre- -- prior calculation and
23 design on the part of Mr. Twyford, even without
24 that evidence in the record, the Ohio Supreme
25 Court upheld the death penalty here by a single

1 vote. So that's the first way.

2 The second way is, if this evidence
3 shows, as we expect that it will, that Mr.
4 Twyford has a severe deficiency in his ability
5 to plan ahead and to think ahead, that will
6 support a new claim of ineffective assistance at
7 the guilt phase. It would go to his ability to
8 satisfy the -- the requirements of the jury
9 instructions. It would go to his competence to
10 stand trial, his -- the voluntariness of his
11 confession.

12 Third, to the extent procedural
13 default issues arise in the district court
14 litigation, that's a federal law issue, and this
15 information that would come from the test could
16 inform that.

17 And, fourth, putting aside the issues
18 of procedural default, if the evidence is -- is
19 as significant as we expect that it will be, we
20 would seek a stay under Rhines v. Weber to go
21 back and develop the state court record and
22 present those issues to the state court.

23 But, Justice Thomas, I don't think
24 those are the questions that this Court needs to
25 resolve to get to -- to resolve the question of

1 whether the district court had the authority to
2 issue this order and whether it appropriately
3 exercised its discretion to do so.

4 And in order to do that, I'd like
5 to -- to posit a slight variation on this case.
6 If the warden refused to move Mr. Twyford from
7 his cell at this correctional institution to an
8 examination room so that he could meet with his
9 expert, I think there would be no question that
10 the district court would have authority in those
11 circumstances to tell the state that they have
12 to not frustrate the district court's order and
13 to allow the -- the inmate to go and meet with
14 his expert.

15 I think that would be obvious. That
16 is conceptually no different from what is
17 happening here.

18 JUSTICE THOMAS: But I guess my point
19 is I understand you will certainly state the
20 facts and the examples in a way that are in --
21 in your best interests, but you don't -- on the
22 other end of that, you don't seem to have any
23 limiting principle.

24 I mean, if he has no idea whether or
25 not he has a claim, it seems as though he could

1 meet with virtually anyone. Yes, an expert
2 would be important. The doctor might be
3 important. But he might say I need to meet with
4 a mentalist or someone to help me recover my
5 memory.

6 There's all sorts of things. You
7 don't -- there seems to not be a point to it, a
8 particular issue that you are trying to -- that
9 you have evidence and you're proving it. It's
10 almost as though it's a fishing expedition.

11 MR. O'NEIL: It -- it is not --

12 JUSTICE THOMAS: And I don't know how
13 you limit that.

14 MR. O'NEIL: Right. So let me explain
15 the numerous limiting principles on the district
16 court's authority here. This order is
17 permissible only for a few reasons.

18 One, it is consistent with and
19 agreeable to the usages and principles of a very
20 specific law, 18 U.S.C. 3599, in which Congress
21 said that capital death row inmates like Mr.
22 Twyford shall be entitled to the services of
23 expert investigative and counsel where
24 reasonably necessary.

25 The only reason that this order is

1 necessary is because the state is not permitting
2 Mr. Twyford access to those services. It's
3 necessary because he cannot -- he cannot engage
4 in the kind of testing that the doctors here
5 have recommended in the hospital. So the only
6 way that he can do it is to be transferred
7 outside the facility to another prison facility.

8 And the fourth is we're not talking
9 about a mentalist or any request of any -- you
10 know, any kind that a prisoner can come up with
11 for investigation. We are talking here about an
12 indication from the Ohio State Director of
13 Cognitive Neurology that the frontal lobe here
14 likely has suffered damages and needs to be
15 investigated. And it is based on the undeniable
16 fact, which the state does not refute, that Mr.
17 Twyford suffered a point-blank gunshot wound at
18 the age of 13, leaving metal in his head.

19 JUSTICE THOMAS: But you're willing to
20 say that this order is -- that you have this
21 right -- that your -- your client has this right
22 even if there's not -- you determine that there
23 was no negative effect on his mental
24 capabilities as a result of this?

25 MR. O'NEIL: We just don't -- we don't

1 know the answer to that yet because the test has
2 not come back. We think that if -- if the Court
3 is going to take this almost like a motion to
4 dismiss and evaluate whether he would be able to
5 show -- whether he'd be able to title -- be
6 entitled to relief, then it has to assume that
7 the test shows the severe harm.

8 And if that's the case, then we --

9 JUSTICE THOMAS: Well, it just seems a
10 little inconsistent with how constrained we have
11 been in the -- under -- under AEDPA, and it just
12 seems that this is out -- this goes beyond what
13 we've done in -- in Pinholster and some of the
14 other cases.

15 MR. O'NEIL: So, Justice Thomas, let
16 me explain why I actually think this is
17 consistent with what this Court has done. The
18 United States says you need to look here to an
19 analogue to this kind of order in order to place
20 it within the usages and principles of law.

21 The Court is not writing on a clean
22 slate here. There is a broad spectrum of types
23 of factual development that take place in the
24 district court. At one end is the inquiry that
25 happens in cases like Pinholster and Schiro v.

1 Landrigan and 2254, where the petitioner --
2 where the inmate is seeking to introduce known
3 facts in evidence.

4 We are at the opposite end of the
5 spectrum. We are not at discovery. The state
6 hasn't answered the petition. We are at the
7 investigation stage. And this Court
8 specifically addressed that stage in the -- in
9 Ayestas. It specifically addressed it in the
10 context of 18 U.S.C. 3599, in which Congress
11 intended for capital -- death row inmates to
12 have access to these investigative services.

13 And what it said there, despite Texas
14 in that case advocating for Pinholster to play
15 the gatekeeping role, this Court did not adopt
16 that standard, it didn't even cite Pinholster
17 and said -- instead, it said that the standard
18 is whether a reasonable counsel would regard the
19 services as having likely utility.

20 And that is much less demanding than
21 the standard that the -- that the state is
22 advocating here. Under Ayestas, the standard
23 is, is the underlying claim plausible, is there
24 a credible chance of overcoming procedural
25 default? We satisfy --

1 JUSTICE SOTOMAYOR: Counsel, on that
2 issue, did you present to the court below? I
3 didn't see it in any of your briefing. I didn't
4 see it anywhere in the district court or circuit
5 court's opinion. I only saw it in the dissent
6 downstairs -- below, that you had to bear a
7 burden of showing at least that there's a
8 plausible reason the evidence could be -- would
9 be admitted. So where did you make that showing
10 below?

11 MR. O'NEIL: We did make that showing
12 under the standard that the district court
13 imposed. And we -- we showed that there are
14 numerous ways in which this evidence could be
15 useful. Pinholster --

16 JUSTICE SOTOMAYOR: No, that's
17 different than whether it would be admissible,
18 because that's what Justice Thomas was asking
19 about, Cullen versus Pinholster, that there is
20 an obligation on habeas to ensure that it's
21 useful for some purpose.

22 MR. O'NEIL: Right.

23 JUSTICE SOTOMAYOR: Where did you make
24 that showing below?

25 MR. O'NEIL: We explained that, first,

1 Pinholster applies only to claims under
2 2254(d)(1). So, if the claim was not
3 adjudicated on the merits, Pinholster does not
4 apply.

5 To the extent we are presenting a
6 claim that was adjudicated on the merits, (d)(1)
7 can be overcome. And we can show that the state
8 court's adjudication on the merits was
9 unreasonable. In addition, we can make these
10 arguments as to procedural default.

11 There are numerous ways in which this
12 evidence may be useful, again, depending on what
13 it is, despite Pinholster. We simply don't know
14 yet how those questions are going to be
15 presented because we are at the investigation
16 stage of this case.

17 This -- this request arises in the
18 context of counsel's investigation, which
19 usually would take place entirely out of sight
20 of -- of a court. And I think understanding how
21 this happens in the usual -- in the usual course
22 explains also why this fills a gap and therefore
23 is appropriate under the All Writs Act.

24 So, typically, a prisoner would go to
25 a court seek -- seeking funding under 3599 for

1 an expert. The court would determine whether
2 reasonable counsel would regard that as having
3 likely utility and, if so, would issue the
4 order. At that point, the warden would
5 effectuate the order, and this -- there wouldn't
6 be this issue.

7 Mr. Twyford is unusual in that he has
8 funding of his own for this test. And so, when
9 the state refused to allow him access to the
10 services the expert said were necessary, the
11 only recourse was to the All Writs Act, which
12 could then fill that gap and effectuate
13 Congress's intent that -- that this capital
14 inmate have a -- an opportunity to access these
15 services.

16 JUSTICE ALITO: What if the only thing
17 counsel said was, we'd like this testing, we
18 really don't know what claims we might bring,
19 and we really don't know how the testing might
20 assist any claims that we might bring, but we
21 just want to see whether anything pops up?

22 Is that enough?

23 MR. O'NEIL: Justice Alito, I think
24 that likely would not be enough. And I think
25 district courts, as you wrote in -- in Ayestas,

1 district courts have plenty of experience making
2 the kinds of determinations that the standard
3 contemplates.

4 JUSTICE ALITO: They would probably
5 not be enough. We won't even -- okay.

6 What's wrong with saying you have to
7 make a connection with AEDPA? This is a
8 habeas -- this is a habeas proceeding, and
9 whatever you get, you're going to have to be
10 able to get before the court that's going to
11 decide the habeas petition. What's wrong with
12 saying that?

13 So identify the claims that you're
14 thinking of. Explain what evidence you think
15 you may get from the testing. Explain how you
16 think you would be able to get that evidence
17 before the court in the habeas proceeding.

18 Why is that so -- why is that so
19 onerous?

20 MR. O'NEIL: That -- the way you just
21 described the standard is -- is not onerous if
22 what is required is what's required in Ayestas,
23 which is that the claims be plausible and that
24 there be a credible chance of overcoming
25 procedural defeat -- procedural default.

1 What the state is arguing is for
2 something fundamentally different. It is saying
3 you have to show exactly how this evidence,
4 before you even know what it is, before the
5 investigation has been conducted, is going to
6 help you -- is going to win you relief on the
7 merits. And Ayestas considered that. Ayestas
8 did not adopt that standard.

9 But we accept a standard that requires
10 us to show some connection to the claims that we
11 have. In fact, we pointed to four claims below.
12 The district court credited counsel's assertion
13 that this investigation was necessary to
14 investigate those claims.

15 And it noted that the showing was
16 supported by objective and compelling facts, in
17 particular, the referral from the Director of
18 Cognitive Neurology and also the -- the
19 undeniable fact of Mr. Twyford's point-blank
20 gunshot injury.

21 JUSTICE ALITO: May I ask you a
22 question about your argument on jurisdiction?
23 From what you said this morning, it wasn't clear
24 to me whether your argument is that no transport
25 order -- that the -- the granting of a transport

1 order may never be appealable under the
2 collateral order doctrine or whether there's a
3 lack of appellate jurisdiction here only because
4 of the specific facts involved, it wasn't a long
5 trip, et cetera. Which is it?

6 MR. O'NEIL: This Court should not
7 create a new category of appealable orders for
8 transportation orders, so transportation orders
9 are not appealable as a class under the blunt
10 instrument of Cohen.

11 Where the warden believes that there
12 is some egregious error by a district court, it
13 can pursue mandamus. It can consider 1292(b)
14 and seek a certification from the district
15 court, or it can use the process that -- that
16 the state has held up today as the right route
17 and go to the Rules Enabling Act process and
18 seek to create a category that way, which is
19 what the Court in Mohawk said was the
20 appropriate --

21 JUSTICE ALITO: So -- so, if we return
22 to -- to the Tiger Man, so suppose that the
23 order is to transport the Tiger Man from one
24 part -- you know, all the way across the country
25 for a period of treatment that's going to last

1 for 45 days and the district court says and he's
2 not to be shackled in a way that's going to make
3 him miserable during -- during this trip.

4 That's not -- you would say, well,
5 that's -- you can't appeal that?

6 MR. O'NEIL: That's a great case for
7 mandamus. And I think that, you know, any court
8 would regard that as pretty egregious. But I
9 would actually like to --

10 JUSTICE ALITO: So we -- you know, for
11 between that and -- and traveling across the
12 street, there are all sorts of gradations. Why
13 shouldn't it just be the rule that these are
14 appealable? What's the big deal about that?

15 MR. O'NEIL: Because it is
16 inconsistent with Mohawk. I mean, Justice
17 Thomas made a -- a -- an excellent argument in
18 Mohawk that Cohen should stay right where it is
19 given the availability of 1292(b) and mandamus
20 and the Rules Enabling Act, but it --

21 JUSTICE ALITO: No, it's a question of
22 statutory interpretation. And we interpreted
23 1291 the way we did, and we practically never
24 undo our decisions on statutory interpretation,
25 and -- and, you know, it's not a final decision,

1 it doesn't necessarily mean the final order in
2 the case. That's not -- you know, that's not
3 a -- a necessary semantic interpretation of that
4 phrase.

5 It could be exactly what Cohen says, a
6 final decision on a particular discrete matter.
7 So why this -- you know, why draw this line?

8 MR. O'NEIL: Because it's inconsistent
9 with Mohawk. At a minimum, it would need to
10 satisfy -- if you're going to stick with Cohen,
11 it needs to satisfy the three Cohen factors.
12 Here, this one fails multiple.

13 First, it's not separate from the
14 merits. The whole argument and the theory of
15 the dissent below was that before you can issue
16 an order like this, you have to evaluate use and
17 admissibility. These are the classic merits
18 questions that are unsuitable for review under
19 Cohen.

20 Second, it's not effectively
21 unreviewable -- unreviewable for exactly the
22 reasons that Justice Sotomayor was elaborating
23 on. Anytime the state --

24 JUSTICE ALITO: Well, let me stop you
25 there. It is unreviewable because, if Tiger Man

1 escapes or kills somebody during his trip,
2 there's no way that's going to be remedied at
3 the end of the case, right?

4 MR. O'NEIL: So it is part of the
5 state's core function and competence to move
6 prisoners back and forth between these two
7 prison facilities. And a lot of the state's
8 argument -- essentially, the state's argument on
9 -- on jurisdiction ultimately rests on this
10 public safety argument.

11 The state did not argue public safety
12 in the district court, and had it done so, we
13 would have introduced evidence that this
14 particular inmate has been moved 16 times
15 between these two facilities, that he is 60 and
16 half blind, and, not surprisingly, there was no
17 incident on those trips, that this facility is a
18 prison.

19 The -- the state's brief and that of
20 its amici conjure these images of, you know,
21 inmates walking the halls of the Ohio State
22 Medical Center. This is a prison within the
23 hospital. It is operated by the Ohio Department
24 of Corrections. If any inmate has anything
25 other than the most routine medical care, they

1 are put on a transport van and they are sent
2 either to the Franklin Medical Center or to this
3 facility, and the -- the Ohio Department of
4 Corrections advertises that on its website.

5 And it -- I would like to -- to
6 explain why -- I think it goes to your question
7 of why this is not immediately reviewable. To
8 evaluate the situation, if this were slightly
9 different, Mr. Twyford wants to go see his
10 expert in an examination room at the Chillicothe
11 Correctional Center where he lives, and the
12 warden says, we are not moving you from your
13 cell to go and do that.

14 Again, I think it's clear that the
15 district court would have gap-filling authority
16 under the All Writs Act to issue that order.
17 And if that is true, which it need -- has to be,
18 then several other things are true.

19 First of all, we wouldn't consider
20 that a writ of habeas corpus. Second, it
21 wouldn't be effectively unreviewable. It
22 wouldn't be a collateral order under Cohen.
23 Otherwise, anytime the -- anytime the warden
24 refused to move someone within the prison, that
25 would give rise to a mid-case appeal, and

1 that -- and that can't be right.

2 And the prisoner in order to get that
3 meeting would not need to show how the evidence
4 would ultimately be useful. That is
5 conceptually no different from what we have
6 here.

7 Mr. Twyford is being asked to move --
8 asked for the warden to move him from one prison
9 facility to another prison facility, and the
10 district court's authority does not depend on
11 whether it's an inter-facility transfer, in
12 other words, a transport by prison van from one
13 building to the other, versus an intra-facility
14 transport, meaning like on an elevator from one
15 floor to the other. Those are equally true
16 here.

17 And if the Court has no further
18 questions, I'm happy to rest on our briefs.

19 CHIEF JUSTICE ROBERTS: Thank you,
20 counsel.

21 MR. O'NEIL: Thank you.

22 CHIEF JUSTICE ROBERTS: Rebuttal,
23 General O'Neil -- General Flowers.

24

25

1 REBUTTAL ARGUMENT OF BENJAMIN M. FLOWERS
2 ON BEHALF OF THE PETITIONER

3 MR. FLOWERS: Thank you, Your Honors.

4 I want to briefly make, if I can,
5 three points.

6 The first is that in terms of the
7 difficulty of applying the collateral order
8 doctrine, appellate courts for decades have had
9 no trouble doing so to these -- to these cases,
10 in large part because most transportation orders
11 are never appealed. There's not actually a
12 problem. It's when the state is concerned with
13 interference with its affairs that it does
14 appeal.

15 To the extent the Court's worried
16 about that, though, it's free here to announce
17 the standards and remand for the Sixth Circuit
18 to consider the still-never-resolved mandamus
19 request through the application of the proper
20 standards.

21 Second, you must have a traditional
22 analogue in order to invoke the All Writs Act.
23 It is not a freestanding power to make up ad hoc
24 writs. The Court's been very clear about that.
25 And if you hold that there is such a power,

1 you'll be contradicting those and inventing a
2 rule with no limiting principle, as Justice
3 Thomas noted.

4 As best I can tell, Twyford believes
5 the All Writs Act allows courts to do anything
6 that may have some speculative benefit to
7 furthering the resolution of a case. The Court
8 has never adopted so free form a -- a version of
9 the All Writs Act, and it shouldn't do so here.

10 That's especially true because, as
11 this Court recognized last week in *Brown v.*
12 *Davenport*, the history of habeas law shows that
13 the tendency to interfere with the state's core
14 sovereign power to punish crime, if -- if -- if
15 the Court does not carefully police the
16 boundaries of the doctrines that permit that,
17 they tend to expand and expand and expand. And
18 I can assure you from my experience in this
19 field there will be a habeas bar eager to expand
20 whatever door you leave ajar to make it as open
21 as it can possibly be.

22 And that brings me finally to the
23 question about what's the big deal, prisoner
24 transportations happen with some regularity.
25 There is a world of difference between the state

1 deciding in its own exercise of its management
2 of its prisons that transportation is warranted
3 and can be done safely and a federal court
4 interfering with the operations of our
5 government and telling us when and how we can
6 move prisoners.

7 Under our rule, the All Writs Act does
8 not permit the courts to do that. Courts can do
9 so only when a rule or a statute specifically
10 permits them to do so, when Congress or this
11 Court have decided that the benefits outweigh
12 the risks. That is the rule the Court should
13 adopt in this case.

14 If there are no further questions, I
15 can sit down.

16 CHIEF JUSTICE ROBERTS: Thank you,
17 counsel.

18 MR. FLOWERS: Thank you, Your Honor.

19 CHIEF JUSTICE ROBERTS: The case is
20 submitted.

21 (Whereupon, at 12:49 p.m., the case
22 was submitted.)

23
24
25

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